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Supreme Court of the United States

October Term, 1966

No. 1306

CHARLES H. FENTON,

Petitioner,

against

A/S GLITTRE,

Respondent,

and

FEARNLEY AND EGER and BARBER LINE,

Third-Party-Respondents.

A/S GLITTRE,

Respondent,

against

ATLANTIC STEVEDORING COMPANY, INC., and GOLTON MARINE CO., INC.,

Third-Party-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JACOB RASSNER,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on December 13, 1966.

Questions Presented

May a shipowner delegate responsibility for all accidents caused by dangerous conditions, other than that of a physical nature, to independent contractors and thus avoid its nondelegable duty to provide a seaworthy vessel and a safe place to work, by the expediency of labelling the proximate cause of the accident "operational negligence"?

Does the warranty of seaworthiness take on a different meaning when applied to shore based maritime employees than when applied to seamen, so that the concept of unseaworthiness, by reason of incompetent inadequate crew and dangerous method of work which constitutes unseaworthiness when applied to seamen, does not hold such a meaning and imposes liability when applied to shore based employees?

Opinion Below

The opinion below is reported at 370 F. 2nd 146.

Jurisdiction

The judgment of the Court of Appeals was entered on December 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Reasons for Granting the Writ

1. Not only is there conflict of opinion between the various Circuit Courts of Appeal, but by the very Judges in their own Court of Appeals, as to the meaning of and applicability of the concept of "warranty of seaworthiness" as to justify and create the necessity for this Honorable Court to take the problem under advisement for clarification.

2. A shipowner's duty to provide a safe place to work has been subjected to conflicting interpretation by various Courts of Appeal and by innumerable Judges to the extent that the entire industry of shipping is in a state of uncertainty and confusion as to the legal significance of the applicable principle of law. At the present time no Judge is in a position to state with any degree of legal certainty as to the meaning of the controlling law in any particular situation involving a breach of warranty of seaworthiness. Insofar as any accident involving maritime service by an individual contractor always has implicit within the circumstances operational activity of some kind or another, every accident can be attributed to operational negligence as the proximate cause of the accident, with the consequential result that uniformity of decision in such maritime matters has been utterly and completely destroyed. The identical set of facts which satisfies one Judge or one Circuit Court of Appeals, that liability exists against the shipowner, when labeled "operational negligence" constitutes a basis for exoneration from liability to a shipowner when brought before a different Judge or brought up for review before a different Circuit Court of Appeals.

3. The protection accorded seamen with relation to accidents brought about by incompetent or inadequate fellow employees or unworkmanlike method of performing maritime services, has in numerous instances, been denied to shore based employees injured under similar circumstances.

Statement of Facts

The petitioner was injured in the morning of February 4, 1958 aboard the vessel M/S Ferngrove owned by the respondent while in the employ of third party respondent, Atlantic Stevedoring Company, Inc.

The Trial Court, in its decision described the accident by referring to the written statement given by the winch

operator, James Livonni, to Dr. Feinberg on the day of the accident which was as follows:

> "Fenton, the gangwayman, followed the draft, guiding it to the hatch. The draft jerked a little as Fenton tried to steady it. He tripped"—initials of the witness are at this point—" between two beams on deck which had been put on deck the day before by another gang working in that hatch. In falling, Fenton tried to protect himself from falling, grabbed the spreaders, causing the draft to hit the ventilator. The spreader that he held came off, causing the draft to spill and hit him on the head." (R. 296)

The Court below in its opinion evaluated petitioner's version of the accident as follows:

> "The arm of the crane was not of sufficient height to allow the draft to clear the ventilator. He then walked toward the draft to steady it. The draft broke apart. In attempting to remove himself from harms way, he tripped over beams or hatches, got his foot wedged between the beams, fell backward and thereby sustained personal injuries."

and, made the following findings of facts:

> "7. At approximately 10:45 on the morning of February 14, 1958, a draft was raised from the dock by the swinging crane and swung rapidly inboard toward hatch No. 3. Because the crane operator did not raise the arm of the crane to a sufficient height, the draft struck a ventilator located at the forward starboard corner of the midship housing, just aft of hatch No. 3. A case of cargo fell from the draft and struck plaintiff, who was standing on deck between the inshore coaming of hatch No. 3 and the inshore rail. The deck area on the inshore side of hatch No. 3 was clear and unobstructed except for a flooring of hatch covers, laid side by side, from the hatch coaming to the rail which formed a flat walking surface. The accident was witnessed by the Third Officer of the m/s Ferngrove, Erland Skaug, and I credit his testimony."

"9. I find that the sole cause of plaintiff's accident was his own negligence and that of his fellow employee, operating the crane."

and the following conclusions of law:

"4. The shipowner is not responsible for the manner in which the employees of the third-party defendant, stevedore, performed their work. Spinelli v. Isthmian Steamship Company, 326 F. 2nd 870 (1964); Oblatore v. United States, 181 F. Supp. 825, 826, aff'd 289 F. 2nd 400, cert. denied 368 U.S. 881. Massa v. C. A. Venezuelan Navigacion, 209 F. Supp. 404, aff'd F. 2nd (2 Cir., 1964).

"5. The accident having been caused by employees of the third-party defendant, Atlantic Stevedoring Company, Inc., it must reimburse the defendant and third-party plaintiff, shipowner, for reasonable counsel fees costs and disbursement incurred in defending plaintiff's claim. Guarracino v. Luckenbach Steamship Company, 333 F. 2nd 646 (2 Cir., 1964)."

ARGUMENT

The need and importance of an expression by this Honorable Court as to questions presented seems clearly demonstrated by the opinions of many Circuit Courts of Appeal in conflict with each other, and judges holding diametrically opposing views, which the decisions in the following cases exemplify.

In the case of *Thompson* v. *Calmar Steamship Corporation*, cert. denied, 379 U.S. 913, 85 S. Ct. 259 (1964) 311 F. 2d 657 (1964) on a petition for rehearing, in the dissenting opinion by Hastie, Circuit Judge, with whom William F. Smith, Circuit Judge joins (dissenting) at page 663, the Court stated:

"Unable to find any satisfactory rationalization for this decision or to comprehend its scope, I fear that the bar and the maritime community will find

> that our ruling leaves confused and doubtful the question of the ship's liability in many situations, in which it heretofore has seemed clear that no liability existed."

In the case of *Reid* v. *Quebec Paper Sales & Transportation Company,* 340 F. 2d 34 (1965), Judge Friendly, in his dissenting opinion stated at page 40:

> "True, there can be no certainty as to the location of the "line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy," 232 F. 2d at 922;* and "logical coordinates for fixing" it "are entirely lacking," 303 F. 2d* at 757 (concurring opinion of Judge Hays)."

In *Reid, supra,* in the prevailing opinion, the Court observed at pages 36 and 37 as follows:

> "Primarily under the force of Judge Learned Hand's pen in Grillea v. United States, 232 F. 2d 919 (2 Cir., 1956), some lower federal courts have refused to hold a shipowner liable for a breach of the warranty of seaworthiness when the accident was attributed solely to an act of negligence of a worker that the court decided had not yet made the workplace unsafe.[2] A distinction emerged between an accident caused by an act of negligence, and one caused by an unsafe condition of the workplace, which in turn may, of course, be due to an act of negligence; only in the latter case would the warranty of seaworthiness be held to be breached. One does not have to be unduly cynical to look askance at this distinction, for every act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it."

In footnote 2, *Reid, supra,* the Court refers to the cases of *Puddu* v. *Royal Netherlands Steamship Co.,* 303 F. 2d 752 (2 Cir.), cert. denied, 371 U.S. 840, 83 S. Ct. 67; *Pinto* v. *States Marine Corp.,* 296 F. 2d 1. (2 Cir. 1961),

cert. denied, 369 U.S. 843, 82 S. Ct. 874; *Spinelli* v. *Isthmian Steamship Co.*, 326 F. 2d 870 (2 Cir.), cert. denied, 377 U.S. 935, 84 S. Ct. 1338; rehearing denied, 377 U.S. 1010, 84 S. Ct. 1912; *Billeci* v. *United States,* 298 F. 2d 703 (9 Cir.) 1962; *Rawson* v. *Calmar S.S. Corp.*, 304 F. 2d 202 (9 Cir.) 1962; *Sullivan* v. *United States,* 203 F. Supp. 496; *Beeler* v. *Alaska Aggregate Corp.*, 336 F. 2d 108, (9 Cir.), 1964.

Dangerous method of work has been held to constitute unseaworthiness.

Thompson v. *Calmar Steamship Corporation, supra*;

Ferrante v. *Swedish American Lines,* 331 F 2d 571, cert. dismissed pursuant to rule 60, 85 S. Ct. 10 (1964), 379 U.S. 801;

Huff v. *Matson Navigation Company,* 338 F. 2d 205 (1964) 380 U.S. 943, 85 S. Ct. 1026;

Italia Societa v. *Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748 (1964).

A most learned review of the existing confusion and uncertainty of applicable law manifested by conflict throughout our circuits appears in the scholarly opinion by Judge Feinberg in the case of *Candiano* v. *Moore-McCormack Lines, Inc.*, 251 F. Supp. 654 (1966) before he was elevated to the Court of Appeals for the Second Circuit.

This Honorable Court in the case of *Seas Shipping Co. Inc.*, v. *Sieracki,* 328 U.S. 85, 66 S. Ct. 872, accepted the concept that longshoremen are doing the work traditionally performed by crew members.

There seems no just, legal or logical reason to make a differentiation in the case of longshoremen by withdrawing and denying to longshoremen the protection of the well established concept that a seaman is entitled to an adequate and competent crew.

It is a self evident fact that as well as well settled law that a crew which does not measure up to the standard of its calling renders the vessel unseaworthy.

The Court of Appeals for the Fifth Circuit in the case of *June T. Inc.* v. *King*, 290 F. 2d 404 (1961), stated at page 407:

> "Of course, to be inadequately or improperly manned is a classic case of an unseaworthy vessel. See Boudoin v. Lykes Bros. S.S. Co., Inc., 1955, 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354, 1955 A.M.C. 488."

The mere fact that the men doing the work traditionally performed by seamen are designated as longshoremen does not seem to be justification for changing the uniform and well established law that if part of the shipboard work is performed by an "inadequately or improperly manned" group of men, that such shortcoming constitutes breach of warranty of seaworthiness.

The irrebuttable fact that there is serious and extensive conflict between the various Courts is demonstrated in the case of *Huff* v. *Matson Navigation Company, supra,* where the Court stated at page 216:

> "We reject what we regard as the ill-advised attempts as exemplified in the McKnight and the Forkin cases to attach unwarranted exceptions to the rules heretofore applied by the Supreme Court in this field."

Many Courts have recognized a defense which can properly be called exoneration from liability by claiming that the proximate cause of the accident was "'operational negligence".

It seems unrealistic, unjust and inequitable to microscopically examine the danger which is the proximate cause

of injury and then by the mere labelling "breach of warranty of seaworthiness" or "operational negligence" determine whether the accident victim is entitled to any redress.

A defense claiming exoneration from liability by the expediency of shifting the blame of a shipowner to a contractor is unconscionable and repugnant to the American concept of fairness and justice whenever shore based employees suffer injuries during the performance of maritime service. *Scott* v. *Isbrandtsen Company,* 327 F. 2d 113 (1964).

The exercise of common sense impels the conclusion that when an unsafe method is used by the ship's personnel or by men engaged to do the work traditionally performed by a crew, that workers so engaged do not have the protection of a "safe place to work" which comes squarely within the concept of warranty of seaworthiness. *Blassingill* v. *Waterman Steamship Corporation,* 336 F. 2d 367 (1964), and cases cited at page 369.

A "hazardous manner" of doing the work constitutes "unseaworthiness".

It seems only fair, just and reasonable to require that a fellow employee aboard a vessel measure up to the ordinary men in the calling, as stated by Judge Learned Hand in the case of *Keen* v. *Overseas Tankship Corp.,* 194 F. 2d 515.

There is no logical basis for differentiating between exposure to danger by reason of an inanimate object as by that of an incompetent, careless, negligent and dangerous fellow employee.

Further proof of the fact that we are faced with a situation requiring clarification by the Supreme Court of the U.S., is expressed by Judge Kaufman in his dissenting opinion in the case of *Radovich* v. *Cunard Steamship Co.,*

364 F. 2d 149 (1966), with "* * * phrases that are like beads of quick silver" and his further comment at page 154:

> "The majority opinion, with commendable candor, recognizes that attempting to read a purposeful design into the distinctions between 'operational' negligence and unseaworthiness 'engenders sympathy for a trial judge attempting to reconcile them'."

and further:

> "But, rhyme or reason evades us even when we exert all our energies to reconcile the cases defining 'operational' negligence vis-a-vis unseaworthiness."

CONCLUSION

The entire maritime industry would be benefited and our Courts relieved of a great deal of avoidable and burdensome litigation if this Honorable Court would see fit to clarify the utter confusion which now exists, as to when and under what circumstances a shipowner may or may not be held liable for maritime accidents, proximately caused by the activities and performance of work by its independent contractors.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

No. 254—September Term, 1966.

(Argued December 9, 1966 Decided December 13, 1966.)

Docket No. 29550

CHARLES H. FENTON,
Plaintiff-Appellant,

against

A/S GLITTRE,
Defendant-Appellee,

and

FEARNLEY AND EGER and BARBER LINE,
Defendants.

A/S GLITTRE,
Defendant and Third-Party Plaintiff-Appellee-Appellant,

against

ATLANTIC STEVEDORING COMPANY, INC. and GOLTON MARINE CO., INC.,
Third-Party Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
HAYS, and FEINBERG, *Circuit Judges.*

Appeal by plaintiff from judgment for defendant-appellant A/S Glittre in the United States District Court for the

Eastern District of New York, Walter Bruchhausen, *J.*, dismissing plaintiff's complaint and appeal by A/S Glittre as third-party plaintiff from judgment dismissing its claim for indemnity against Golton Marine Co., Inc. Judgment dismissing plaintiff's complaint affirmed. A/S Glittre's appeal as third-party plaintiff withdrawn in open court.

JACOB RASSNER, New York N. Y. (Alan C. Rassner, on the brief), *for Plaintiff-Appellant.*

J. WARD O'NEILL, New York, N. Y. (Haight, Gardner, Poor & Havens, Thomas F. Molanphy, on the brief), *for Defendant and Third-Party Plaintiff-Appellee-Appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz, Sidney A. Schwartz, on the brief), *for Third-Party Defendant-Appellee, Golton Marine Co., Inc.*

PER CURIAM:

Plaintiff longshoreman appeals from a judgment for defendant shipowner entered in the United States District Court for the Eastern District of New York after a non-jury trial. In the trial court, plaintiff apparently argued that the ship was unseaworthy (and the shipowner negligent) because of an encumbered deck which proximately caused his injury. The trier of fact found against plaintiff on these issues and also found that the sole cause of the accident was plaintiff's own negligence and that of a fellow employee operating a crane. Plaintiff argues here that these findings must be reversed but we see no reason to disturb them. Plaintiff also claims in this court that the condition of a draft of cargo made the ship unseaworthy as a matter of law and that this caused his injury. The

record indicates that these contentions were not pressed at trial;[1] in any event, holding the ship unseaworthy on this theory as a matter of law is unjustified on this record. Accordingly, the judgment for defendant shipowner dismissing plaintiff's complaint is affirmed. The shipowner's "protective" appeal against third-party defendant Golton Marine Co., Inc. was withdrawn in open court.

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[1] *E.g.*, appellant's appendix, pp. 175a, 207a.

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of December, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

CHARLES H. FENTON,
Plaintiff-Appellant,

v.

A/S GLITTRE, FEARNLEY & EGER and BARBER LINE,
Defendants and Third-Party Plaintiffs-Appellants,

ATLANTIC STEVEDORING COMPANY, INC. and COLTON MARINE CO., INC.,
Third-Party Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel

and counsel for the defendant and third-party plaintiff-appellant A/S Glittre withdrew its appeal against Colton Marine Co., Inc., in open court.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered, adjudged and decreed that the appeal of the defendant and third-party plaintiff-appellant A/S Glittre be and it hereby is withdrawn as against the Colton Marine Co., Inc.

A. DANIEL FUSARO,
Clerk.